

STATE OF MICHIGAN
COURT OF APPEALS

JEANI STEPKE,

Plaintiff-Appellant,

v

EDWARD REYNOLDS and BOOTHMAN,
HEBERT & ELLER, P.C.,

Defendants-Appellees.

UNPUBLISHED

July 29, 2003

No. 239407

Jackson Circuit Court

LC No. 01-002825-NO

Before: Zahra, P.J., and Talbot and Owens, JJ.

MEMORANDUM.

Plaintiff appeals as of right the order granting defendants' motion for summary disposition in this legal malpractice action. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendants represented plaintiff in a divorce action. See *Stepke v Stepke*, unpublished opinion per curiam of the Court of Appeals, issued 06/23/00 (Docket No. 220499). We note the following pertinent facts from the divorce action:

On February 12, 1999, approximately six weeks before trial, defendant served interrogatories, request for production of documents, and request for admissions on plaintiff. The interrogatories and request for admissions comprised 123 paragraphs, and the request for admissions included requests pertaining to most of the best interest factors set forth in § 3 of the Child Custody Act, as well as plaintiff's alleged extramarital affairs. Pursuant to court rule, answers were due on March 12, 1999. See MCR 2.312(B)(1). Plaintiff did not answer the request for admissions until March 25, 1999, the day before trial. Because the answers were not timely, the matters covered by the requests were deemed to be admitted. MCR 2.312(B)(1). On the first day of trial, plaintiff moved to withdraw the admissions and requested that the trial court permit her to file the late answers. The trial court denied plaintiff's motion.

During trial, while plaintiff's counsel was conducting his direct examination of plaintiff, defendant objected to a line of questioning regarding who was primarily responsible for the children's emotional support, contending that the issue was covered by the admissions. The trial court ruled that it would "take the

testimony” in spite of the admissions, and further stated, “I’m going to go through the admissions, and I’m going to filter out what applies and what doesn’t.” The admissions were ultimately used by the trial court in determining the best interest factors and a review of the record indicates that it repeatedly used the admissions as factors weighing against plaintiff. [*Id.* at slip op p 4.]

The trial court in the divorce action ultimately awarded custody of the children to the father, and we reversed on appeal, finding in part that the court erred in relying on the admissions. *Id.* at slip op p 6.

Plaintiff filed this malpractice action, primarily asserting that defendants were negligent in filing the late answer to the request for admissions. The trial court granted defendants’ motion for summary disposition.

To establish a legal malpractice case, the plaintiff has the burden of proving (1) the existence of an attorney-client relationship, (2) negligence in the legal representation, (3) that the negligence was a proximate cause of the injury, and (4) the fact and extent of the injury. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 585-586; 513 NW2d 773 (1994), quoting *Coleman v Gurwin*, 443 Mich 59, 63; 503 NW2d 435 (1993). To prove proximate cause, the plaintiff must establish that the defendant’s action was a cause in fact of the claimed injury, and that, but for the alleged malpractice, plaintiff would have been successful in the underlying suit. *Reinhart*, *supra* at 586, quoting *Coleman*, *supra* at 63.

Plaintiff failed to meet her burden of showing causation. As this Court found in the underlying appeal, the trial court in the divorce action did not honor the judicial admissions. The admissions would have established that the father prevailed on all of the custodial factors. Although the court stated that it would give effect to the admissions, it proceeded to take testimony on the custodial factors, and to make findings of fact that contradicted the admissions. The only factor that the court found favored the father was moral fitness. That factor was unaffected by counsel’s late answers. Plaintiff testified that she had three extramarital affairs. Plaintiff’s answers to the request for admission acknowledged these affairs, thus, the information would be before the court regardless of counsel’s actions.

Where the court did not give effect to the judicial admissions in the divorce action, there is no showing that counsel’s actions causing the admissions to be accepted changed the custody decision.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Donald S. Owens